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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1061

WALTER D. TEAGUE III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

Petitioners,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners above named respectfully pray for a rehearing of the decision of the Court, made April 21, 1969, denying the petition for certiorari.

Grounds for Rehearing

It appears from the dissents to the order denying certiorari that the denial was based upon a conclusion that the Court lacked jurisdiction because the docketing of the petition was two days out of time. The delay was the direct

result of a breakdown in mail service caused by a snowstorm. The facts pertaining to the delay were set forth in petitioners' supplemental brief. This petition is limited to a consideration of the jurisdictional issue.

Petitioners believe that the dissenting opinion of Mr. Justice Black correctly analyzed the jurisdictional problem, and within its context point out only one further, but compelling detail: In *Grigsby* v. *Purcell,* 199 U. S. 505 (1879), the Court discussed its refusal, except in unusual circumstances, to consider cases which had been docketed late. It concluded, at 507:

> "The real objection is not that this court has no jurisdiction, but that the plaintiff in error, or the appellant, as the case may be, has failed to duly prosecute his suit."

See also *Southern Pine Lumber Co.* v. *Ward,* 208 U. S. 126, 136-137 (1908).

Petitioners suggest, however, that the issue is even simpler and is clearly determined by the language of the statute itself. The jurisdiction of this Court is left by the Constitution for definition by Congress. The basic grant of jurisdiction is contained in 28 U. S. C. §§1251-1258. The question is whether the time limitation contained in 28 U. S. C. §2101, in a different chapter of the Code, is also jurisdictional. The provisions applicable to this case are those in 28 U. S. C. §2101(c), the first sentence of which requires that a petition for certiorari be docketed within ninety days after entry of the judgment sought to be reviewed. The second sentence of the subsection provides that the period may be extended for cause by a single Justice

for a further sixty days. Except that cause must be shown, the granting of an extension is completely discretionary.

In this case we are concerned only with whether the initial ninety-day period is jurisdictional, for no enlargement had been sought or granted prior to the filing of the petition. But a time period which may be enlarged at the discretion of one Justice cannot conceivably be jurisdictional, no matter how that term be defined.

The statute contains no limitation as to when an enlargement must be sought. Thus, so far as jurisdiction is concerned, enlargement may be sought at any time. (Rule 34 of the Rules of this Court which provides that an application for enlargement of time be made prior to the expiration of the initial period, is not a limitation of jurisdiction.)

Petitioners' supplemental brief, explaining the delay in docketing, prayed that the Court accept the petition as timely. That was certainly a sufficient application for an enlargement of time, which the Court may properly act upon at any time. *Georgia Hardwood Lumber Co.* v. *Compania,* 323 U. S. 334, 337 (1945).

It is helpful to compare the effect of late filing of a notice of appeal in a criminal case under former Rule 37(a) of the Federal Rules of Criminal Procedure. The time limitation contained in that Rule had consistently been held to be "mandatory and jurisdictional." But in *Fallen* v. *United States,* 378 U. S. 139 (1964), the doctrine was relaxed when the delay was beyond the control of the party. The Court said, 378 U. S. at 144:

> "Since petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits."

The *Fallen* case bears a striking similarity to the instant one. There a prisoner gave his notice of appeal to prison authorities for mailing in sufficient time to be received by the clerk if it had been mailed promptly. It arrived two days late, apparently because it had missed by a few hours the twice-weekly mail pickup at the prison.

The history of the amendments to the rules relating to the time for taking appeals in both civil and criminal cases shows clearly the shift away from the earlier doctrine that the time limits were jurisdictional. See 9 *Moore's Federal Practice,* ¶73.09[3] for the development of the rule in civil cases and 8A *Moore's Federal Practice,* ¶37.05[4] in criminal cases.

That no similar recent history appears with respect to 28 U. S. C. §2101 is understandable. Unlike former Civil Rule 73 and Criminal Rule 37, the language of the statute is not restrictive by its terms. The present statute is a much liberalized version of its predecessor considered in *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418 (1923), which apparently provided for no enlargement at all, and which Mr. Chief Justice Taft characterized as jurisdictional.

If §2101(c) does deprive this Court of jurisdiction to consider petitions for certiorari which are delayed by unexpected snowstorms, then the Court must consider whether the statute is constitutional. There is a grave question of due process if a precious right may be lost because of an uncontrollable whim of nature.

The practical consequences of the Court's decision in this case, if permitted to stand, are serious: No litigant may safely entrust papers to the mails. Added to the

already imposing burden of litigation will be the not-insignificant expense of filing petitions for certiorari by hand.

It is ironic that such a rule should emerge in a case in which officers of the United States are parties. The government's inability to cope with a heavy snowstorm will have immunized its acts from review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Certificate

I hereby certify, pursuant to Rule 58 subdivision 2 of the Rules of this Court, that the foregoing petition for a rehearing is presented in good faith and not for delay and that the said petition is restricted to substantial grounds not previously presented to this Court in the petition for certiorari or the petitioners' supplemental brief.

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